

**STATUTES AND RULES PERTAINING TO
MOTIONS FOR *EN BANC* REHEARING AND
PETITIONS FOR DISCRETIONARY REVIEW,
WITH SAMPLE PETITION
(pmg 170918)**

N.C. Gen. Stat. § 7A-16 (2017)
Creation and organization of the Court of Appeals
(excerpt)

. . . . The Court of Appeals shall sit in panels of three judges each and may also sit en banc to hear or rehear any cause upon a vote of the majority of the judges of the court. . . .

Except as may be provided in *G.S. 7A-32*, three judges shall constitute a quorum for the transaction of the business of the court when sitting in panels of three judges, and a majority of the then sitting judges on the Court of Appeals shall constitute a quorum for the transaction of the business of the court when sitting en banc. . . .

N.C. Gen. Stat. § 7A-31 (2017)
Discretionary review by the Supreme Court
(excerpt)

(a) In any cause in which appeal is taken to the Court of Appeals, including any cause heard while the Court of Appeals was sitting en banc, except a cause appealed from the North Carolina Industrial Commission, the North Carolina State Bar pursuant to *G.S. 84-28*, the Property Tax Commission pursuant to *G.S. 105-345*, the Board of State Contract Appeals pursuant to *G.S. 143-135.9*, the Commissioner of Insurance pursuant to *G.S. 58-2-80* or *G.S. 58-65-131(c)*, a court-martial pursuant to *G.S. 127A-62*, a motion for appropriate relief, or valuation of exempt property pursuant to *G.S. 7A-28*, the Supreme Court may, in its discretion, on motion of any party to the cause or on its own motion, certify the cause for review by the Supreme Court, either before or after it has been determined by the Court of Appeals. A cause appealed to the Court of Appeals from any of the administrative bodies listed in the preceding sentence may be certified in similar fashion, but only after determination of the cause in the Court of Appeals. The effect of such certification is to transfer the cause from the Court of Appeals to the Supreme Court for review by the Supreme Court. If the cause is certified for transfer to the Supreme Court before its determination in the Court of Appeals, review is not had in the Court of Appeals but the cause is forthwith transferred for review in the first instance by the Supreme Court. If the cause is certified for transfer to the Supreme Court after its determination by the Court of Appeals, the Supreme Court reviews the decision of the Court of Appeals.

Except in courts-martial and motions within the purview of *G.S. 7A-28*, the State may move for certification for review of any criminal cause, but only after determination of the cause by the Court of Appeals.

(b) In causes subject to certification under subsection (a) of this section, certification may be made by the Supreme Court **before** determination of the cause by the Court of Appeals

(c) In causes subject to certification under subsection (a) of this section, certification may be made by the Supreme Court **after** determination of the cause by the Court of Appeals when in the opinion of the Supreme Court any of the following apply:

- (1) The subject matter of the appeal has significant public interest.
- (2) The cause involves legal principles of major significance to the jurisprudence of the State.
- (3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

Interlocutory determinations by the Court of Appeals, including orders remanding the cause for a new trial or for other proceedings, shall be certified for review by the Supreme Court only upon a determination by the Supreme Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm.

(d) The procedure for certification by the Supreme Court on its own motion, or upon petition of a party, shall be prescribed by rule of the Supreme Court.

N.C. R. App. P. 15 (2017)

Rule 15. Discretionary review on certification by
Supreme Court under N.C.G.S. § 7A-31
(complete)

(a) Petition of party. Either prior to or following determination by the Court of Appeals of an appeal docketed in that court, any party to the appeal may in writing petition the Supreme Court upon any grounds specified in *N.C.G.S. § 7A-31* to certify the cause for discretionary review by the Supreme Court; except that a petition for discretionary review of an appeal from the Industrial Commission, the North Carolina State Bar, the Property Tax Commission, the Board of State Contract Appeals, or the Commissioner of Insurance may only be made following determination by the Court of Appeals; and except that no petition for discretionary review may be filed in any post-conviction proceeding under Article 89 of Chapter 15A of the General Statutes, or in valuation of exempt property under Chapter 1C of the General Statutes.

(b) Petition of party--Filing and service. A petition for review prior to determination by the Court of Appeals shall be filed with the clerk of the Supreme Court and served on all other parties within fifteen days after the appeal is docketed in the Court of Appeals. For cases that arise from the Industrial Commission, a copy of the petition shall be served on the Chair of the Industrial Commission. A petition for review following determination by the Court of Appeals shall be similarly filed and served within fifteen days after the mandate of the Court of Appeals has been issued to the trial tribunal. Such a petition may be contained in or filed with a notice of appeal of right, to be considered by the Supreme Court in the event the appeal is determined not to be of right, as provided in Rule 14(a). The running of the time for filing and serving a petition for review following determination by the Court of Appeals is terminated as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for filing and serving

such a petition for review thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely petition for review is filed by a party, any other party may file a petition for review within ten days after the first petition for review was filed.

(c) *Petition of party--Content.* The petition shall designate the petitioner or petitioners and shall set forth plainly and concisely the factual and legal basis upon which it is asserted that grounds exist under *N.C.G.S. § 7A-31* for discretionary review. The petition shall state each issue for which review is sought and shall be accompanied by a copy of the opinion of the Court of Appeals when filed after determination by that court. No supporting brief is required, but supporting authorities may be set forth briefly in the petition.

(d) *Response.* A response to the petition may be filed by any other party within ten days after service of the petition upon that party. No supporting brief is required, but supporting authorities may be set forth briefly in the response. If, in the event that the Supreme Court certifies the case for review, the respondent would seek to present issues in addition to those presented by the petitioner, those additional issues shall be stated in the response. A motion for extension of time is not permitted.

(e) *Certification by Supreme Court-- How determined and ordered.*

(1) *On petition of a party.* The determination by the Supreme Court whether to certify for review upon petition of a party is made solely upon the petition and any response thereto and without oral argument.

(2) *On initiative of the court.* The determination by the Supreme Court whether to certify for review upon its own initiative pursuant to *N.C.G.S. § 7A-31* is made without prior notice to the parties and without oral argument.

(3) *Orders; Filing and service.* Any determination to certify for review and any determination not to certify made in response to a petition will be recorded by the Supreme Court in a written order. The clerk of the Supreme Court will forthwith enter such order, deliver a copy thereof to the clerk of the Court of Appeals, and mail copies to all parties. The cause is docketed in the Supreme Court upon entry of an order of certification by the clerk of the Supreme Court.

(f) *Record on appeal.*

(1) *Composition.* The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) *Filing; Copies.* When an order of certification is filed with the clerk of the Court of Appeals, he or she will forthwith transmit the original record on appeal to the clerk of the Supreme Court. The clerk of the Supreme Court will procure or reproduce copies thereof for distribution as directed by the Court. If it is necessary to reproduce copies, the clerk may require a deposit by the petitioner to cover the costs thereof.

(g) *Filing and service of briefs.*

(1) *Cases certified before determination by Court of Appeals.* When a case is certified for review by the Supreme Court before being determined by the Court of Appeals, the times allowed the parties by Rule 13 to file their respective briefs are not thereby extended. If a party has filed its brief in the Court of Appeals and served copies before the case is certi-

fied, the clerk of the Court of Appeals shall forthwith transmit to the clerk of the Supreme Court the original brief and any copies already reproduced for distribution, and if filing was timely in the Court of Appeals this constitutes timely filing in the Supreme Court. If a party has not filed its brief in the Court of Appeals and served copies before the case is certified, the party shall file its brief in the Supreme Court and serve copies within the time allowed and in the manner provided by Rule 13 for filing and serving in the Court of Appeals.

(2) Cases certified for review of Court of Appeals determinations. When a case is certified for review by the Supreme Court of a determination made by the Court of Appeals, the appellant shall file a new brief prepared in conformity with Rule 28 in the Supreme Court and serve copies upon all other parties within thirty days after the case is docketed in the Supreme Court by entry of its order of certification. The appellee shall file a new brief in the Supreme Court and serve copies upon all other parties within thirty days after a copy of appellant's brief is served upon the appellee. An appellant may file and serve a reply brief as provided in Rule 28(h).

(3) Copies. A party need file, or the clerk of the Court of Appeals transmit, but a single copy of any brief required by this Rule 15 to be filed in the Supreme Court upon certification for discretionary review. The clerk of the Supreme Court will thereupon procure from the Court of Appeals or will reproduce copies for distribution as directed by the Supreme Court. The clerk may require a deposit by any party to cover the costs of reproducing copies of its brief. In civil appeals *in forma pauperis* a party need not pay the deposit for reproducing copies, but at the time of filing its original new brief shall also deliver to the clerk two legible copies thereof.

(4) Failure to file or serve. If an appellant fails to file and serve its brief within the time allowed by this Rule 15, the appeal may be dismissed on motion of an appellee or upon the Court's own initiative. If an appellee fails to file and serve its brief within the time allowed by this Rule 15, it may not be heard in oral argument except by permission of the Court.

(h) Discretionary review of interlocutory orders. An interlocutory order by the Court of Appeals, including an order for a new trial or for further proceedings in the trial tribunal, will be certified for review by the Supreme Court only upon a determination by the Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm to a party.

(i) Appellant, appellee defined. As used in this Rule 15, the terms "appellant" and "appellee" have the following meanings:

(1) With respect to Supreme Court review prior to determination by the Court of Appeals, whether on petition of a party or on the Court's own initiative, "appellant" means a party who appealed from the trial tribunal; "appellee" means a party who did not appeal from the trial tribunal.

(2) With respect to Supreme Court review of a determination of the Court of Appeals, whether on petition of a party or on the Court's own initiative, "appellant" means the party aggrieved by the determination of the Court of Appeals; "appellee" means the opposing party; provided that, in its order of certification, the Supreme Court may designate either party an appellant or appellee for purposes of proceeding under this Rule 15.

N.C. R. App. P. 31.1 (2017)

**Rule 31.1. Motion for En Banc Consideration by Court of Appeals
(complete)**

(a) **When Hearing or Rehearing En Banc May Be Ordered.** A majority of the judges on the Court of Appeals may order that an appeal be heard or reheard by the court en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the case involves a question of exceptional importance that must be concisely stated.

(b) **Content.** The motion for en banc consideration shall explain with particularity why en banc consideration is necessary.

(c) **Motions for Initial En Banc Hearing.** At any point after the appellant's brief is filed but no later than fifteen days after the filing of the appellee brief, any party may file a motion for en banc consideration. The motion shall be accompanied by proof of service upon all other parties. Within ten days after service of the motion, any party may file a response thereto. The filing shall be accompanied by proof of service upon all other parties. The court will rule upon the motion within thirty days after the case is fully briefed and may rule upon it prior to that time. The filing of the motion will not stay the time for briefs to be filed. When a motion for en banc consideration is allowed, the case will be calendared as soon as practicable.

(d) **Motions for En Banc Rehearing.** A motion to rehear any case en banc may be filed within fifteen days after the opinion of the court has been filed. The motion shall be accompanied by proof of service upon all other parties. Within ten days after service of the motion, any party may file a response thereto. The filing shall be accompanied by proof of service upon all other parties. Within thirty days after the motion is filed, the court will either allow or deny the motion. The denial of the motion will trigger the time for taking an appeal of right to the Supreme Court pursuant to *N.C.G.S. § 7A-30* and for filing a petition for discretionary review pursuant to Rule 15. If the motion is allowed, the clerk shall forthwith notify the parties that the motion has been granted. The case will be reconsidered solely upon the record on appeal, the motion for en banc rehearing and any responses thereto, new briefs of the parties if requested by the court, and oral argument if the court decides to hear oral argument. Entry of the en banc opinion vacates the original panel opinion.

(e) **Stay of Mandate.** When a motion for en banc rehearing is filed, the movant may obtain a stay of the mandate from the court. The procedure is as provided by Rule 8 of these rules for stays pending appeal.

(f) **Motions to Be Heard First.** If a party files both a motion pursuant to this rule for en banc rehearing and a Rule 31 petition for rehearing, the court will rule on the motion for en banc rehearing first. The time for ruling on the Rule 31 petition for rehearing shall commence to run from the date of entry by the Court of Appeals of an order denying the en banc motion.

A Style Manual for the North Carolina Rules of Appellate Procedure

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A Typical Petition for Discretionary Review

No.

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Names as in Trial Division,)
)
 Plaintiffs,)
)
 v.)
)
 Names as in Trial Division,)
)
 Defendants.)
)

From Wake County
 No. COA 09-10

PETITION FOR DISCRETIONARY REVIEW
UNDER N.C.G.S. § 7A-31(C)

Notes on Cover Page of Petition for Discretionary Review:

- The petition number in the upper left corner is blank, to be filled in by the Supreme Court.
- Note that the Court of Appeals docket number, not the trial court docket number, appears below the county name on the right side. See Appendix B.
- Consult Rule 15, Appendix D, and N.C. Gen. Stat. § 7A-31 for time limits and similar information.

IV. Supreme Court Practice

Notes on Due Date for a Petition for Discretionary Review:

- A Petition for Discretionary Review following a determination by the Court of Appeals must be filed and served within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. See Rule 15(b).
- The mandate issues automatically on the 20th day after the issuance of the Court of Appeals opinion. See Rule 32(b). Counsel does not receive any notice that the mandate has issued. Counsel should therefore be careful to calculate herself the deadline for a Petition for Discretionary Review: 35 total days after the issuance of the opinion (20 plus 15). See Rule 15(b).
- The petition must be actually received by the Clerk of the Supreme Court by the 35th day to be considered timely.

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I. THIS CASE INVOLVES LEGAL PRINCIPLES
OF MAJOR SIGNIFICANCE TO THE
JURISPRUDENCE OF THIS STATE

A. Because Century is not a “claimant” or
“policyholder” and does not possess a
“covered claim” under the Act, it is not
entitled to any recovery from the
Association..... x

B. This Court’s precedents foreclose the Court
of Appeals’ expansive interpretation of the
word “claimant” x

II. THE SUBJECT MATTER OF THIS APPEAL
HAS SIGNIFICANT PUBLIC INTEREST x

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Notes on Index:

- This illustrates another form of a contents page, with a mixture of ALL-CAPS and lower-case section titles.
- The margins are indented 3/4” from each regular one-inch margin, leaving a 5” line.
- The dot leaders (“”) for the page numbers are optional.
- The petition only requires an index if it is ten pages or more in length. See Appendix B.

TABLE OF AUTHORITIES

Cases:

City of Greensboro v. Reserve Ins. Co., 70 N.C. App.
651, 321 S.E.2d 232 (1984)..... 7

Statutes:

N.C. Gen. Stat. § 15A-221 13

Rules:

N.C. R. Civ. P. 10 4

Other Authorities:

U.S. Const. amend. IV 14

Notes on Table of Authorities:

- If the petition is fewer than ten pages, this table may be omitted. See Appendix B.
- If a table of authorities is included, the format is the same as any brief (see A Typical Appellant’s Brief, *supra*, for a fuller discussion on the formatting).

No.

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

NORTH CAROLINA)
INSURANCE ASSOCIATION,)

Plaintiff,)

v.)

MID-CENTURY INDEMNITY)
CO.,)

Defendant.)

From Wake County
No. COA 09-1544

PETITION FOR DISCRETIONARY REVIEW
UNDER N.C.G.S. § 7A-31(c)

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Plaintiff, the North Carolina Insurance Association (the “Association”), respectfully petitions the Supreme Court of North Carolina to certify for discretionary review the judgment of the North Carolina Court of Appeals filed on 21 February 2017 in this cause, on the grounds that the subject matter of this case involves legal principles of major significance to the jurisprudence of this State and raises issues

of significant public interest. In support of this Petition, the Association shows the following:

FACTS

The plaintiff filed a complaint on 23 June 2016 in the Superior Court of Wake County. Judge Jonathan R. Smith granted the defendant's summary judgment motion at the 21 November 2016 Civil Session. The plaintiff filed notice of appeal to the Court of Appeals on 1 December 2016. The Court of Appeals affirmed the order of dismissal in a published opinion, filed 14 February 2017.

The Association is an unincorporated non-profit entity created pursuant to the North Carolina Insurance Guaranty Act . . .

Notes on Facts:

- The first part of this section should set forth a statement of the case—the procedural history of the case through the trial tribunal and the Court of Appeals. See Appendix D.
- The second part of this section should set forth a statement of the facts—enough for the Court to understand the basis of the petition. See *id.*

[Factual background continues]

REASONS WHY CERTIFICATION SHOULD ISSUE

The decision below imposes a liability on the Association that is contrary to the language and intent of the statutory scheme

governing the Association's existence and presents . . .

[Argument continues]

Notes on Reasons Why Certification Should Issue:

- The focus of this section should be to show: a) how the opinion of the Court of Appeals conflicts with prior decisions of the Supreme Court, b) how the case is significant to the jurisprudence of the State, or c) why the case is one of significant public interest. See N.C. Gen. Stat. § 7A-31, Rule 15, and Appendix D.
- Some factual and legal argument will be necessary in this section, but the new brief will be the place for the substantive discussion of the arguments, if the Supreme Court takes the case. See Rule 15 and Appendix D.
- N.C. Gen. Stat. § 7A-31 explains the procedures for petitions filed prior to the determination of the case in the Court of Appeals.

ISSUE TO BE BRIEFED

In the event the Court allows this Petition for Discretionary Review, the Petitioner intends to present the following issue in its brief to the Court:

I. Whether a claim founded upon the doctrine of equitable subrogation entitles an insurer to recover from the Association to the extent of the Association's statutory obligations, despite the Act's clear exclusion of claims founded upon subrogation from the definition of a “covered claim.”

Note on Issue to be Briefed:

- Be careful to be precise and complete in this section, because “[a]n issue may not be briefed if it is not listed in the petition.” See Appendix D.

Respectfully submitted, this the 1st day of March, 2017.

[LAW FIRM NAME, if any, and only if
counsel is retained and not appointed]

[Name of Counsel]
Attorneys for Plaintiff-Appellant
160 N. Main Street
Newland, NC 28786
(828) 456-1245
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lawyer@lawfirm.com

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing Petition for Discretionary Review Under N C. Gen. Stat. § 7A-31 has been served this day by depositing a copy thereof in a depository under the exclusive care and custody of the United States Postal Service in a first-class postage-prepaid envelope properly addressed as follows:

[Counsel's name and address]

This the 1st day of March, 2017.

Name of Counsel

Following the petition, attach a copy of the decision of the Court of Appeals, if you are petitioning after a decision by that court.

Notes on "Bypass Petitions":

- N.C. Gen. Stat. § 7A-31 and Rule 15 allow a party to petition for Supreme Court review of certain matters either *before* or *after* determination by the Court of Appeals.
- A petition for discretionary review ("PDR") cannot be filed until the appeal is docketed in the Court of Appeals, which occurs shortly after the final record on appeal is filed. See Rule 15(a).
- A PDR filed *before* the Court of Appeals determines the matter is commonly referred to as a "Bypass Petition" or "Bypass PDR."
- Bypass Petitions are rarely granted.
- The filing of a Bypass Petition *does not* stay proceedings in the Court of Appeals. Parties may, of course, move the Court of Appeals for an extension of time in which to file their briefs while a Bypass Petition is pending before the Supreme Court. It is not uncommon, however, for briefing in the Court of Appeals to proceed before the Bypass PDR has been ruled upon.